



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NYERI
JR MISC APPLN. NO. 24 OF 2014

HON. GEORGE M. MUCHAI.....APPLICANT

VERSUS

REGISTRAR OF TRADE UNIONS.....1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

AND

RAJAB W. MWONDI.....1ST INTERESTED PARTY

FRANCIS ATWOLI.....2ND INTERESTED PARTY

ISAIAH KUBAI.....3RD INTERESTED PARTY

NELSON MWANIKI.....4TH INTERESTED PARTY

CENTRAL ORGANIZATION OF

TRADE UNIONS (COTU K).....5TH INTERESTED PARTY

RULING

1. On 30th October, 2014 Justice Nduma Nderi granted the applicant therein leave to apply for Judicial Review orders within 21 days from the date of the order granting leave. The Judge further ordered that the leave do operate as a stay against the 1st Respondent restraining them from acting on or implementing any decision of the 1st, 2nd, 3rd, and 4th Interested party or any other person whatsoever suspending the applicant from his position as Deputy Secretary General of COTU(K), the 5th Interested Party.

2. The following day that is the 31st October, 2014 the 1st and 2nd Interested Party brought an application under certificate of urgency seeking the setting aside of the orders of Justice Nderi especially the aspect on stay arguing that the effects of the stay order would paralyse the operations of the 5th Interested Party.

3. This application was placed before me on 3rd November, 2014 when I directed that the same be served on the Respondent since I felt I was not in a position to grant or refuse the orders

sought therein *ex parte*. I further directed that the matter be mentioned before me today for directions.

4. When the matter came up, Dr. Khaminwa appearing for the applicant in the initial Judicial Review Application requested that I direct that this matter be placed before Honourable Nderi as he was the one seized of it. This request faced resistance from counsel for the Interested Parties with Mr. Aduda arguing that once Justice Nderi heard the leave application, there was nothing pending before the Judge and any other Judge was competent to hear the substantive motion or subsequent applications. This position was associated to by all the counsels appearing for Respondents and Interested Parties.

5. Mr. Aduda further contended that his client, the applicant in the present application, is entitled to challenge the operation of leave as a stay which his client has done.

6. Order 53 (3) permits a Judge in an application for leave to apply for judicial review orders to impose such terms as the Judge thinks fit prior to granting such leave. The order further provides that where the circumstances so require, the Judge may direct that the application for leave be served for *inter partes* hearing before grant of leave and that the Judge may further direct that the question of leave and whether grant of leave should operate as a stay be heard and determined separately within 7 days.

7. Applications for leave to apply for judicial review are made *ex parte* however, as observed above, the rules permit service on the Respondent in certain cases before the order is made.

8. The logic behind this window of service on the Respondent is clear in the sense that it is a settled principle of natural justice that a party must not be condemned unheard. Leave operating as a stay, is in nature *injunctive* and where to direct a stay pending the filing and hearing of a substantive motion would occasion injustice to the party to be restrained some hearing need to be accorded to that party.

9. Whereas, Order 53 is not clear on whether a party affected by a stay order can move the Court after the issuance of such order, the element of hearing provided by Rule 4 coupled with the inherent power of the Court recognized under section 3A of the Civil Procedure Act, article 159 (d) and 259 of the Constitution seems to render permissible an application by a party adversely affected by a stay order. Perhaps this where the applicant before me is grounded but this is open to argument in the event that the application proceeds on merit.

10. The applicants (1st and 2nd) Interested Party complained that the stay order if not varied or set aside would paralyse the operations of the 5th Interested party. They moved to Court almost immediately the stay order was made. This demonstrates the seriousness they attach to the matter. They may be wrong or right but this can only be determined after hearing.

11. In the circumstance the Court directs that the Respondent in this application dated 30th October i.e. the applicant in application for judicial review. (Hon. George Muchai) file a response to the present application within 14 days from the date hereof.

12. Concerning whether this matter should be mentioned before Hon. Justice Nderi, the Court is of the view that when Justice Nderi entertained the application for stay he did so in his capacity as the Judge on duty that week and having heard and determined the application for leave and issued orders as he did, he became *functus officio*. The Judge became akin to any other Judge who can entertain an *ex parte* application and issue orders without necessarily having to hear the matter *inter partes* on return date. This practice which has been observed by the High Court since time immemorial is sound and enables another Judge to hear arguments and arrive at a decision which may be the same as the *ex-parte* Judge or different. It also shields Judges from being associated with particular cases.

13. In conclusion, therefore I hereby direct as above that the Respondent in this application that is to say Hon. George Muchai to file a response to the same within 14 days from the date hereof and that the same be mentioned for further directions on 27/11/2014.

14. The prosecution of this application does not in any way affect the orders issued by Justice Nderi concerning the filing of substantive judicial review application.

15. It is so ordered.

Dated at Nairobi this 12th day of November 2014

Abuodha J. N.

Judge

Delivered this 12th day of November 2014

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge